

No. 82-2007

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In the Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK KELLY ANDREW, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

BRENDA GRUSS

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether the totality of the circumstances set forth in the affidavit in support of the search warrant for petitioner's residence provided probable cause for issuance of the warrant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. C1-C7) is reported at 705 F.2d 468 (table).

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1983. The petition for a writ of certiorari was filed on May 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of manufacturing methamphetamine, and one count of possession with intent to manufacture methamphetamine, in violation of 21 U.S.C. 841(a)(1); one count of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. (Supp. V)

924(c); and one count of possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to concurrent five-year terms on counts one and two; a consecutive three-year term on count three; a concurrent two-year term on count four; and a two-year special parole term on counts one and two. The court of appeals affirmed petitioner's conviction (Pet. App. C7).

1. On October 7, 1981, Federal Magistrate Nordin F. Blacker of the Northern District of California issued a warrant authorizing the search of petitioner's residence at 12110 Blake Lane, San Jose, California (Pet. App. A1-A3). Execution of the search warrant on October 8, 1981, resulted in the seizure of laboratory equipment, methamphetamine (a schedule II controlled substance), and two firearms (*id.* at C1-C2).

Prior to trial, petitioner moved to suppress the seized evidence on the ground that the affidavit (Pet. App. A7-A15) in support of the search warrant, sworn to by San Jose City police officer Jeff Ouimet, failed to provide probable cause for the search. According to the affidavit, an untested informant told San Jose City police officer Dennis Luca that on September 25, 1981, the informant, a user of methamphetamine, went with a companion to buy methamphetamine at a house on Cherry Avenue in San Jose. The house was in an orchard area; near the Almaden Expressway; on the same side of the street as the Robertsville Car Wash; and had an American flag on a pole outside. The informant's companion went into the house and returned with a plastic baggie containing an ounce of methamphetamine. The companion told the informant that methamphetamine was currently being manufactured in the house. According to the informant, a person named "Pat" lived in the house. *Id.* at A8-A9.

Officer Luca relayed the information provided by the informant to San Jose City police officer David Luna, who investigated the informant's tip. Officer Luna located a house matching the description given by the informant at 12110 Blake Lane in San Jose. Officer Luna did a registration check on a car parked in the driveway and found that the car was registered to a known alias of a man previously convicted of manufacturing methamphetamine. Pet. App. A9-A11.

Officer Luna reported his findings to Officer Ouimet, who continued the investigation. Officer Ouimet spoke with a San Jose City police officer who lived in the neighborhood of the residence. That officer had noticed a medicinal odor that resembled ether outside the house and had observed that the drapes of the house had not been opened for several months. Officer Ouimet learned that the odor of ether is often present during the manufacture of methamphetamine and that manufacturers often vent the processing odors outside. Pet. App. A12-A13.

Officer Ouimet then viewed for himself the 12110 Blake Lane residence and confirmed Officer Luna's conclusion that although the informant had been mistaken about the address of the house, the house on Blake Lane matched the informant's description in all other respects (Pet. App. A13). Officer Ouimet also saw a black cylindrical object, larger than most pipes or vents, protruding from the roof of the house (*id.* at A13-A14). Based on these facts, Officer Ouimet sought and obtained the search warrant that led to petitioner's arrest.

2. The district court denied petitioner's motion to suppress evidence seized during execution of the search warrant at petitioner's residence (Pet. App. B1-B10), and the court of appeals affirmed (*id.* at C1-C7). The court of appeals held that the informant's tip satisfied the "four corners" test of *United States v. Anderson*, 453 F.2d 174,

177 (9th Cir. 1971), and that the affidavit contained sufficient incriminating information corroborated or independently discovered by the police to satisfy the probable cause requirements of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

ARGUMENT

Petitioner contends (Pet. 9) that the affidavit did not provide probable cause for the search of his home because the affidavit met neither the "four corners" test of *Anderson* nor the "two-pronged" *Aguilar-Spinelli* test. Both the district court and the court of appeals rejected petitioner's contentions. Further review of the sufficiency of the affidavit by this Court is unwarranted, particularly because this Court's decision in *Illinois v. Gates*, No. 81-430 (June 8, 1983), undercuts petitioner's heavy reliance on the "two-pronged" *Aguilar-Spinelli* test.

1. Petitioner contends (Pet. 9-17) that the affidavit violated the Ninth Circuit's "four corners" rule¹ because it did not contain the information necessary to conclude that the events the informant said took place on Cherry Avenue in fact occurred on Blake Lane. The "four corners" rule, however, does not preclude the magistrate from drawing reasonable inferences from the facts contained in an affidavit for a search warrant. See *Illinois v. Gates*, *supra*, slip op. 25. Since it is highly improbable that two houses in San Jose both bear the same relationship to the Almaden Expressway, the Robertsville Car Wash, and the orchard area, and also have flagpoles, the affidavit fully supports the inference

¹In *United States v. Anderson*, 453 F.2d 174, 177 (9th Cir. 1971), the court held that "all facts and circumstances relied upon for the issuance of a federal warrant [must] be found in the written affidavit." In *Anderson*, the government conceded that the affidavit itself failed to establish probable cause, but asked the court to hold the deficiencies cured by the affiant's supplemental oral statements (*id.* at 175-176).

that the informant simply confused Blake Lane and Cherry Avenue. Unlike *Anderson*, therefore, resort to information not contained in the affidavit is unnecessary. As the district court held, "the other details supplied [by the informant] make it clear that [the erroneous street] was an unintentionally mistaken detail" (Pet. App. B10).²

2. Petitioner asserts (Pet. 20) that [t]rying to assess the reliability of the [informant's] information * * * is like trying to get a firm grip on jello" and further contends (*id.* at 22) that the informant had no personal knowledge of the facts described in the affidavit.³ Petitioner then addresses each item of corroborative evidence provided by the police and argues that each item alone is too minor or innocuous to justify the magistrate's probable cause determination (*id.* at 26-38).

In *Gates*, this Court rejected the notion that the informant's "reliability" and "basis of knowledge" are two elements of independent status. Instead, the Court deemed the informant's "reliability" and "basis of knowledge" relevant considerations in a "totality of circumstances" analysis, in which deficiencies in one or even both factors may be compensated for by other indicia of reliability. *Illinois v. Gates*, *supra*, slip op. 18. Contrary to petitioner's assertion (Pet.

²Even if the magistrate had consulted a map and thereby discovered that Blake Lane adjoins Cherry Avenue (see Pet. 11, 14), there would have been no violation of the "four corners" rule. *Anderson* did not deal with facts subject to judicial notice, such as the location of streets on a map. See Fed. R. Evid. 201. In any event, the inferences reasonably drawn from the affidavit itself, discussed above, make resort to extrinsic materials totally unnecessary.

³Petitioner's complaint (Pet. 10-11) about the hearsay nature of much of the informant's information is undercut by his own admission (*id.* at 10) that an affidavit relying on hearsay "is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." *Jones v. United States*, 362 U.S. 257, 269 (1960). As described above, the affidavit in this case meets that test.

25), the informant's report was sufficiently detailed to exclude the possibility that his tip regarding the drug sale was only casual rumor or speculation. Although the informant did not claim to have witnessed a methamphetamine transaction inside the house, he gave a first-hand description of the house where the transaction took place, including the name of a local business establishment (the Roberts-ville Car Wash); the topography around the house (orchard area); the house's unique characteristics (the flag pole); and the name of a resident ("Pat").⁴ The informant also stated that he saw his companion return from the house with the drug, described the drug's appearance and packaging, and explained that he knew it was methamphetamine because he was a user.

In addition, police investigation provided corroborative evidence that more than made up for any lack of first-hand knowledge or other indicia of reliability on the part of the informant. The car parked in the driveway of the house was registered to the known alias of a convicted methamphetamine manufacturer. The telephone at the house was listed to a known alias of the petitioner, who had prior drug convictions. An officer had smelled ether, a substance used in the manufacture of methamphetamine, outside the house several weeks before the transaction. Ether must be vented outside, and an officer had observed a large cylindrical pipe or vent protruding from the roof of the house. While each of these factors standing alone might not have been sufficient to establish probable cause, see, e.g., *Beck v. Ohio*, 379 U.S. 89, 97 (1964), *United States v. Tate*, 694 F.2d 1217, 1221 (9th Cir. 1982), petition for cert. pending, No. 83-24, the relevant inquiry is "not whether particular [corroborating] conduct is 'innocent' or 'guilty,' but the degree of

⁴The fact that the informant made a mistake about the street name only highlights the significance of the other details, since the officers were able to locate the place described from the other information provided.

suspicion that attaches to particular types of non-criminal acts." *Illinois v. Gates, supra*, slip op. 29 n.13. Taken together, the various corroborating factors in this case compelled the magistrate's "practical, common-sense decision [that], given all the circumstances set forth in the affidavit before him * * *, there [was] a fair probability that contraband or evidence of a crime [would] be found" at petitioner's residence. Slip op. 23.

In *Gates*, this Court reemphasized its teaching that reviewing courts " 'should not invalidate * * * warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " *Illinois v. Gates, supra*, slip op. 21, quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965). The lower courts' decisions in this case demonstrate that petitioner's arguments had little merit even under the regime of *Aguilar* and *Spinelli*. Application to this case of the more practical, factual approach of *Gates* shows that petitioner's contentions are altogether without merit and that the magistrate's issuance of the search warrant was fully justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

BRENDA GRUSS
Attorney

SEPTEMBER 1983